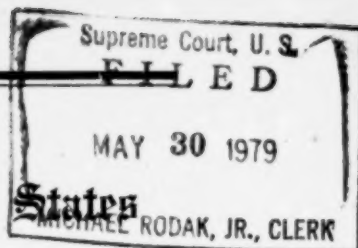


78-1794



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78

THOMAS A. COUGHLIN III, individually and as Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities, et al.,

Petitioners,

against

NEW YORK STATE ASSOCIATION FOR RETARDED
CHILDREN, INC., et al.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

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NEW YORK STATE ASSOCIATION FOR RETARDED
 CHILDREN, INC., et al.,

Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
 UNITED STATES COURT OF APPEALS FOR THE
 SECOND CIRCUIT**

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit rendered herein on March 1, 1979.

Opinions Below

The opinions of the lower courts are not yet reported. The opinion of the Court of Appeals for the Second Cir-

* In addition to the parties named in the caption, the petitioners are Hugh L. Carey, Governor of the State of New York,

(footnote continued on following page)

cuit is reproduced beginning at page 1a of the appendix; the memorandum and order of the District Court for the Eastern District of New York is reproduced beginning at page 34a, thereof.

Jurisdiction

The judgment of the Court of Appeals was rendered and entered on March 1, 1979. The jurisdiction of this Court to review that judgment rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the lower courts violated the rules established by this Court for the interpretation of consent judgments?

(footnote continued from preceding page)

Jennifer L. Howse, Ph.D., Associate Commissioner, Office of Mental Retardation and Developmental Disabilities, Elin M. Howe, Director, Philip Ziring, M.D., Deputy Director, Clinical Services and James Shea, Deputy Director, Institutional Administration, Staten Island Developmental Center. The other respondents are Benevolent Society for Retarded Children, Willowbrook Chapter of the New York State Association for Retarded Children; Lara R. Schneps, by her father Murray B. Schneps; Nina Galin, by her mother Diana Lane McCourt; Anthony Rios, by his father Jesus Rios; David Amoroso, by his mother Rosalie Amoroso; Rose Evelyn Cruz, by her father Francisco M. Cruz; Barry Friedman, by his father Melvin Friedman; Lowell Scott Isaacs, by his father Jerome W. Isaacs; and Antoinette Magri, by her mother Sandra Magri; Patricia Parisi, by her mother Lena Steuernagel; Anselmo Clarke, by his mother Estella Clarke; Nelson Agosto, by his aunt and next friend Lucilia DeJesus; Frances Breen, by her sister Mary Morganstern as committee of her person and property; John Duffy, by his next friend Robert L. Feldt, Esq.; Evelyn Cruz, by her father Francisco Cruz; Bonnie Rose, by her mother Anne Rose; Mario Narvaez, by his mother Carmen Narvaez; John Doe, by his mother Jane Doe; Steven Rosepka, by his father Ben Rosepka; individually and on behalf of all others similarly situated.

2. Whether the relief granted by the lower courts violated the Eleventh Amendment to the Constitution?

3. Whether the order of the District Court, as affirmed by the Court of Appeals, is unenforceable for vagueness?

Constitutional Provision Involved

Amendment XI, U. S. Constitution

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

Statement of the Case

In March, 1975, the State of New York entered into an agreement designed to settle this action which had been brought pursuant to 28 USC § 1343; 42 USC § 1983 to correct conditions of care and treatment of the mentally retarded at Willowbrook State School,* which allegedly violated the constitutional rights of its residents. This settlement followed nearly three years of active litigation, including voluminous discovery, protracted evidentiary hearings and the issuance of a preliminary injunction, *N.Y. State Ass'n For Retarded Children v. Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973). The agreement, formulated after hard bargaining between representatives of the plaintiffs, the Governor, the Commissioner of Mental Hygiene and the Director of the Budget, was a compromise in the classic sense. There was no admission of liability on the part of the defendants. However, the par-

* Now Staten Island Developmental Center, N.Y. Mental Hygiene Law § 13.17(b), L. 1978, ch. 23, § 1.

ties established in Appendix A to the judgment an elaborate set of standards, procedures and goals for Willowbrook which were neither the minimum standards that defendants viewed as constitutionally permissible, nor the desired optimum that plaintiffs would have preferred, *N. Y. State Ass'n For Retarded Children v. Carey*, 393 F.Supp. 715, 717 (EDNY 1975).

In addition to describing this elaborate plan to improve conditions at Willowbrook and to eventually reduce the size of the resident population to 250 (8-9a) the judgment provided for three bodies to monitor its enforcement (9a).

The seven-member Willowbrook Review Panel consists of three plaintiffs' nominees, two defendants' nominees, all approved by the court; one expert in the management of public institutions and one expert in the management of community facilities for the mentally retarded, either chosen by agreement of the parties with the approval of the court or by the court from their nominees (10a). Under the terms of the judgment the defendants are required to pay the members of the Review Panel a monthly compensation for the performance of their duties, reimburse them for their expenses and provide them with offices and a full-time staff (11a).

The defendants and certain supervisory personnel at Willowbrook are required to report their progress at implementing the judgment to the Review Panel. Its members and staff have full access to the institution, its employees, the members of the plaintiff class, whether still resident at Willowbrook, transferred to another institution or to a community facility and to all pertinent records. Any interference with the Review Panel is punishable as a contempt of court (11a).

The Review Panel is required to make periodic formal recommendations to the defendants on implementation of the judgment and for resolution of any disagreements con-

cerning the fulfillment of the plan contained in Appendix A thereto. The Review Panel's recommendations are binding upon all parties unless formal objection is made within fifteen days. In such case, the recommendations are subject to court review. However, the district court presumes them to be correct in matters of fact. Anyone objecting to them has the burden of coming forward to show that the recommendation is improper at which point the burden shifts to the Review Panel to establish their correctness and propriety by a fair preponderance of the evidence (11-13a).

A Professional Advisory Board, as its name implies, consists of "eminent professionals" in the field of mental retardation and related disciplines. Its seven members advise on programs and conditions at the institution (13-14a).

A Consumer Advisory Board, also of seven members, "made up of parents or relatives of residents, community leaders and residents or former residents," was designed to provide lay input; and, in particular, to represent the interests of "non-correspondent" members of the plaintiff class, whose interests are not actively protected by a parent, relative, legal guardian or committee. There are over 600 non-correspondents (13-14a).

Section S.8 of the Appendix to the judgment provides that members of the P.A.B. and C.A.B. are reimbursed for their reasonable expenses and "where appropriate * * * receive appropriate compensation." But, most important, unlike the Review Panel, the judgment does not provide for staffs for these two advisory bodies: although the defendant Commissioner of Mental Hygiene had voluntarily provided and paid for a coordinator, a full-time secretary and funds to pay consultants on a per-diem basis (37-38a).

The instant proceeding arose when the Review Panel formally recommended that the defendants hire for the C.A.B. an additional staff of four professionals and one

secretary (15a). The Department of Mental Hygiene rejected this proposal as unnecessary; beyond the scope of the consent judgment and in violation of the Eleventh Amendment (17, 39-40a). A hearing was held before the district court on these objections. Upon consideration, the district court approved the Review Panel's recommendation, finding that the C.A.B. members were unable to perform their assigned function without additional staff (16-17a). Judge Bartels rejected the defendants' contentions that the C.A.B. had an exaggerated view of its functions; found that its *in loco parentis* role required it to become personally familiar with the needs of all non-correspondents; that it was not duplicating the work of other advisory or advocacy bodies; nor was it overrelying on staff (18-19a; 40-46a).

The district court justified its decision on the basis that the cost of additional staffing was an "expense" of the C.A.B. within the meaning of the judgment. In doing so, Judge Bartels overruled defendants' objections that the consent judgment did not provide for staffing the C.A.B. and thus the Review Panel lacked the power to recommend the employment of such staff to the defendants (15a; 48-51a). The district court was apparently sensitive to the difficulties inherent in such a ruling and held in the alternative that the evidence adduced at the hearing justified a modification of the consent judgment (19a; 51-53a).

The district court also rejected the defendants' contention that the Review Panel's proposal violated the Eleventh Amendment to the Constitution (53-54a). The defendants were enjoined to take

all action necessary to secure implementation of the Review Panel's recommendation, within their lawful authority and subject to any legislative approval that may be required, and to take all steps necessary to ensure the full and timely financing of the recommendation including, if necessary, submission of the

appropriate budget requests to the legislature (20a; 55a)

The court of appeals sustained the State's contention that the provision of \$130,000 per year for the new staff was not a "reasonable expense" of the C.A.B. It did not reach the issue raised by the district court's alternative holding; noting however, that the procedure for modifying the consent judgment had not been followed (20a). Instead, the court of appeals affirmed the judgment of the district court on the basis that the nature of the consent judgment and the complex and changing conditions at Willowbrook required a flexibility in its enforcement that was permitted under this Court's rulings in *United States v. Armour & Co.*, 402 U.S. 673 (1971) and *United States v. I.T.T. Continental Baking Co.*, 420 U.S. 223 (1975) (21a).

The court of appeals further held that the powers vested in the Review Panel under the judgment to make recommendations were sufficient to keep it within the "four corners" doctrine articulated in the *Armour* case (21-23a).

Defendants' arguments that the order was impermissibly vague and that it violated the Eleventh Amendment were also rejected. The court agreed that the district court properly left the specifics of implementation to the State defendants (24-25a). The Eleventh Amendment was not transgressed because the order simply provided for prospective injunctive relief, despite its fiscal impact; and, that the consent judgment, under which the Review Panel made its recommendation was itself, a waiver of the State's sovereign immunity (26a).

Reasons for Granting the Writ

I.

The judgment of the court of appeals substantially deviates from the "four corners" rule articulated by this Court in *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971), and represents an infringement on state sovereignty not permitted under the Eleventh Amendment as construed by *Edelman v. Jordan*, 415 U.S. 615, 673 (1974). If permitted to stand, this ruling will substantially inhibit the settlement of public litigation.

The rule for construing a consent judgment was described by Mr. Justice Marshall as follows:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes, as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of the consent decree must be discerned within its four corners and not be reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the

instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claim and legal theories in litigation. (emphasis in original, footnote omitted)

United States v. Armour & Co., *supra*.

Yet the lower courts clearly went beyond this "four corners" rule. Nowhere does the judgment provide for a staff for the C.A.B. as it does for the Review Panel. Applying a judicial figleaf and labelling it "construction" cannot hide the fact that the court of appeals sanctioned a modification of the judgment. Even the resort to the context and circumstances under which the judgment was entered, *United States v. I.T.T. Continental Baking Co.*, 420 U.S. 233, 238 (1975), cannot alter the plain language of the judgment.

The prejudice to the petitioners is obvious. Had the courts below required that paragraph 9 of the judgment, which authorizes modification pursuant to Fed.R.Civ.P. Rule 60(b) be followed, petitioners could have received proper notice of the relief sought. Moreover, instead of the petitioners being required to overcome the presumption in favor of the Review Panel's recommendations, the burden would have been on the party seeking modification. Yet the lower courts ignored this and in doing so eviscerated the doctrine stated by Mr. Justice Cardozo that,

[t]here is a need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting

• • •

The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardships so extreme and unexpected as to justify us in saying that they are the victims of oppression. *Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned* * * * Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall. (emphasis supplied)

United States v. Swift & Co., 286 U.S. 106, 119 (1932).

The error committed by the lower courts is compounded by the fact that apart from third parties brought into the action in aid of the enforcement of the judgment, see, e.g. *N.Y. State Ass'n For Retarded Children v. Carey*, 438 F. Supp. 440 (E.D.N.Y. 1977) and 466 F. Supp. 479, 486 (E.D.N.Y. 1978), the defendants are state officials and that the real party in interest is the State of New York. The settlement of this action by the State was a waiver of its sovereign immunity, made only after protracted negotiations between plaintiffs' representatives, the Attorney General, the Governor, the Commissioner of Mental Hygiene and the Director of the Budget, the latter being necessary to the bargaining process because of the requirement to allocate and appropriate funds to carry out the terms of any consent judgment. Unfortunately, the court of appeals lost sight of the political nature of settlements of public litigation. Despite paying lip service to the "four corners" doctrine (21a) what it did, in fact, was to retrospectively alter the terms of the consent decree in the name

of "flexibility of enforcement" (22a). In partial justification, the lower court referred to the relatively small sum involved and the acquiescence in prior recommendations of the Review Panel (14-15; 19a). However, regardless of the amount of money involved the result of sustaining a recommendation beyond the Review Panel's power is to destroy the basis of the State's waiver of its sovereign immunity; indeed, the result is to further infringe upon state sovereignty, despite this Court's admonition that a waiver of sovereign immunity will be found only by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction, *Edelman v. Jordan*, 415 U.S. 615, 673 (1974). Thus, the court of appeals has written a blank check to the respondents, particularly the Willowbrook Review Panel to unilaterally change the terms of the settlement; and has served notice to the State of New York and the other states in the Second Circuit that if they settle public litigation, they are subject to retrospective modifications by the courts on the basis of newly perceived conditions contrary to their legitimate expectation. Under these circumstances it is hard to imagine that state governments would be inclined to settle such cases in the future. This is a most undesirable if not dangerous prospect.

The settlement of civil litigation is indispensable to our legal system. Without the compromise of nearly 90% of all lawsuits, the courts would be hopelessly clogged and unable to function. Apart from the promotion of judicial economy, the public interest is served by the voluntary resolution of disputes and tends to promote the interest of the parties by minimizing the risks of further litigation.

These considerations, generally favoring the settlement of cases, apply with particular force to complex public litigation such as the instant case. As Judge Judd expressed it in approving the settlement:

During the three-year course of this litigation, the

fate of the mentally impaired members of our society has passed from an arcane concern to a major issue both of constitutional rights and social policy. The proposed consent judgment resolving this litigation is partly a fruit of that process. . . . Had this case been finally submitted for determination on the merits, the court would have faced a substantial burden in analyzing the briefs and the mass of testimonial and documentary evidence which was submitted by both sides and which bears on the right to relief and the formulation of the various categories of relief. Happily, the parties have relieved the court of this task and have brought to bear on the forging of relief their evident expertise. The court has reviewed the proposed judgment and each of the Steps, Standards and Procedures, and finds them neither impractical nor beyond the scope of the complaint.

N.Y. State Association For Retarded Children v. Carey, *supra*, at 393 F.Supp. 718.

With the recent proliferation of lawsuits brought against state officials that seek broad relief to correct alleged denial of legal and constitutional rights in state institutions and in society at large, a decision such as rendered by the court of appeals can only result in a greater reluctance on the part of the states, which must bear in mind a multitude of demands upon the public treasury, *Dandridge v. Williams*, 397 U.S. 471, 455-456 (1970), to settle these cases when they cannot be assured that the settlement will be binding and that they will not be exposed to additional demands by the plaintiffs.

II.

The court of appeals very candidly stated in its decision (25a) that the power of the defendants to comply with the district court's order was limited by the willingness of

the Legislature to appropriate the necessary funds (24-25a). But neither the district court nor the court of appeals indicated whether the petitioners would be exculpated if the Legislature refused to budget the item. Accordingly, the district court's order was unenforceable under Fed.R. Civ.P. Rule 65(d), *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 438-439 (1976); *Longshoremen's Ass'n v. Marine Trade Association*, 389 U.S. 64, 76 (1967). The failure of the lower courts to explicitly spell out the extent of petitioners' obligations herein is a particularly acute problem in the instant case, where the plaintiffs and the Review Panel, have on a number of occasions threatened or actually moved to hold the petitioners, including the Governor, in contempt of court. Even if such motions are denied, the public spectacle of a high government official being forced to justify his official conduct in a contempt proceeding is most unfortunate and is to be avoided, see *Socialist Workers Party v. Attorney General*, — F2d —; 47 U.S.L.W. 2634, 2635 (2d Cir. 1979).

III.

The court of appeals has thus decided substantial federal questions contrary to the applicable decisions of this Court. The public interest, we submit, calls for its review and correction, U.S. Sup.Ct. Rules, Rule 19(1)(b); *N.Y. City Transit Authority v. Bezar*, — U.S. —, 59 L.Ed. 2d 587, 593-94 (1979).

CONCLUSION

Certiorari should be granted.

Dated: New York, New York
May 30, 1979

Respectfully submitted,

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Appendix A - Opinion, United States Court Of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 417—August Term, 1978.

(Argued December 13, 1978 Decided March 1, 1979.)

Docket No. 78-6072

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN,
INC., *et al.*, and PATRICIA PARISI, *et al.*,

Appellees,

—v.—

HUGH L. CAREY, individually
and as Governor of the State of New York, *et al.*,

Appellants,

UNITED STATES OF AMERICA,

Amicus Curiae.

Before:

MANSFIELD and OAKES, *Circuit Judges,*
and POLLACK, *District Judge.**

Appeal from an order of the United States District
Court for the Eastern District of New York, John R. Bar-

* Of the United States District Court for the Southern District
of New York, sitting by designation.

Appendix A

tels, *Judge*, approving Review Panel's request, pursuant to its power to make recommendations under a consent judgment between the parties, for staff for supervisory board at state facility for the mentally retarded. *Held*, the flexibility inherent in the enforcement mechanism and the Review Panel's authority to make recommendations to implement the consent judgment required court to enforce request. Judgment affirmed.

ROBERT S. HAMMER, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirschowitz, First Assistant Attorney General, William A. Carnahan, Deputy Commissioner and Counsel, Paul F. Stavis, Deputy Counsel, Margaret M. Corcoran, Attorney, Paul Litwak, Deputy Counsel, New York State Department of Mental Hygiene; Clarence J. Sundram, Assistant Counsel to the Governor, of counsel), *for Appellants*.

MICHAEL S. LOTTMAN, Willowbrook Review Panel, New York, N.Y. (Murray B. Schneps, of counsel), *for Appellee Willowbrook Review Panel*.

JACK BERNSTEIN, Protection and Advocacy System for Developmental Disabilities, Inc., New York, N.Y., *for Appellee New York State Association for Retarded Children, Inc.*

CHRISTOPHER A. HANSEN, New York Civil Liberties Union, New York, N.Y. (Kalman Finkel, Legal Aid Society, Civil Division,

Appendix A

John Kirklin, Director of Litigation, Carol Kellerman, Legal Aid Society, Civil Appeals and Law Reform Unit), *for Mental Health Law Project*.

OAKES, *Circuit Judge*:

This appeal, on first view, might be thought to involve the power of a federal court to order a state facility for the retarded to hire additional staff at expense to the public fisc in order to meet court-imposed requirements. Upon further analysis, however, the appeal is from a limited order appurtenant to a rather complex organizational structure for the operation of the facility. The structure itself was established by the parties in a Consent Judgment settling the original proceeding in this litigation after a preliminary injunction granted by the United States District Court for the Eastern District of New York, the late Orrin G. Judd, Judge.¹ That court approved the Consent Judgment² after trial had commenced on a claim under Section 1983 of the Civil Rights Act,³ brought as a class action on behalf of mentally retarded children and adults residing at Willowbrook Developmental Center (Willowbrook), formerly the Willowbrook State School for the Mentally Retarded and now the Staten Island Developmental Center. In the close to seven years that the litigation has been pending, neither party has sought appellate review of the many determinations made

¹ *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973).

² *New York State Ass'n for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975).

³ 42 U.S.C. § 1983.

Appendix A

by the district court. Here the state officials' responsible for the operation of Willowbrook bring the first appeal, involving the question whether the State should provide funding for a few additional staff for the Consumer Advisory Board, one of the advisory bodies established by the Consent Judgment. The state officials challenge the propriety of the order for such provision on the basis that it is contrary to the express terms of the Consent Judgment or constitutes an unreasonable interpretation or modification thereof, is vague and otherwise unenforceable, and requires additional appropriations from the State's treasury in violation of the Eleventh Amendment. We find the arguments unavailing and affirm the judgment of Judge John R. Bartels below.

In order properly to put the order appealed from in perspective, it is necessary to review the history of the litigation, the scope of the Consent Judgment, the operational structure under the judgment, and the district court's factual determinations as to the necessity for the staff.

HISTORY OF THE LITIGATION

The complaint was filed under Section 1983 on March 17, 1972, the plaintiffs being a group of parents, volunteer organizations, and individual residents at Willowbrook, which at that time had a population of approximately 5,200, officially 65% over capacity, and was the

⁴ Appellants include the Governor of New York; the New York State Department of Mental Hygiene; the Commissioner, Deputy Commissioner, and Second Deputy Commissioner of the Division of Mental Retardation and Children's Services of that Department; the Director and Deputy Directors of Willowbrook itself; and others. All are collectively referred to as the "state officials" or "the State" herein.

Appendix A

largest institution of its kind in the country. The suit alleged that the conditions at the institution were physically so inadequate and the environment so destructive and dehumanizing that many of the residents had regressed and their condition deteriorated after their admission. The plaintiffs, who are here appellees, requested preliminary injunctive relief involving the hiring of more medical and supporting staff, prohibitions against the use of seclusion and physical restraints, separate bedroom and day areas for the residents, appropriate clothing, and comprehensive medical and hospitalization facilities. In *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973), Judge Judd, after five days of hearings and on the basis of "a sheaf of exhibits, a folder of photographs, and hundreds of pages of affidavits considered as part of the record," as well as the court's visit to Willowbrook, found that Willowbrook consisted of approximately forty-three buildings with a resident population of 4,727 on December 10, 1972, reduced from 5,700 at the beginning of the action and a high of 6,200 in 1969. *Id.* at 755. Over three-quarters of the residents he found to be profoundly or severely retarded, having intelligence quotients below 35, with approximately one-third suffering from epileptic seizures and over half having been in Willowbrook for more than twenty years. Twenty-seven percent of the residents he found to be there voluntarily, and their treatment did not differ from that given to those there under court order. On the testimony of parents and the affidavits of others, the judge found numerous failures to protect the physical safety of the children and deterioration rather than improvement of their condition, with poor physical maintenance and in effect "conditions . . . hazardous to the health, safety, and sanity of the

Appendix A

residents." *Id.* at 756.⁵ In a very careful opinion, Judge Judd held that plaintiffs had no constitutional right to treatment based on due process or equal protection but that plaintiffs' constitutional right to protection from harm in a state institution meant that the Willowbrook residents were "entitled to at least the same living conditions as prisoners." *Id.* at 764. The judge found that the plaintiffs did not have such conditions; accordingly, he granted preliminary relief including:

1. A prohibition against seclusion. . . .
2. Immediate hiring of additional ward attendants. . . .
3. Immediate hiring of at least 85 more nurses. . . .
4. Immediate hiring of 30 more physical therapy personnel. . . .
5. Immediate hiring of 15 additional physicians. . . .
6. Immediate hiring of sufficient recreational staff. . . .
7. Immediate and continuing repair of all inoperable toilets. . . .
8. Consummation within a reasonable time of a contract with an accredited hospital. . . .
9. Periodic reports [to the court] concerning the progress of the defendants in meeting these requirements. . . .

Id. at 768-69. All requirements were based on achieving conformity with the minimum standards of the Accreditation Council for Facilities for the Mentally Retarded.

Subsequent to the intervention of the United States Department of Justice as amicus curiae in support of the plaintiffs, the latter moved to have several state officials held in contempt, a motion that Judge Judd denied;

⁵ For additional findings, see Judge Judd's memorandum opinion and order granting plaintiffs a preliminary injunction, 357 F. Supp. 752.

Appendix A

although he found that the defendants had not complied with his earlier order, he felt unable to allocate blame for the noncompliance. Trial commenced on October 1, 1974; and eight expert witnesses, numerous parents, and analysts from the Department of Justice testified in support of the plaintiffs' case. The case was almost but not quite settled midtrial; trial ended on January 6, 1975, with the defendant Thomas A. Coughlin's predecessor, Robert W. Hayes, the Deputy Commissioner of the New York State Department of Mental Hygiene in charge of Willowbrook, having described the institution as no longer a "major tragedy," as he had previously characterized it, but as still a "moderate tragedy." Settlement negotiations were renewed after a change of administration in state government and continued until April 1975 when both sides signed a Consent Judgment. Judge Judd approved the consent judgment on April 30, 1975, in a short memorandum opinion. *New York State Association for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975).

SCOPE OF CONSENT JUDGMENT

The Consent Judgment governs the operation of Willowbrook and the care and treatment of all mentally retarded members of the plaintiff class, that is, all persons who were residents of Willowbrook on the date that the lawsuit was filed. The judgment expressly incorporates an appendix of "steps, standards and procedures" (hereinafter Appendix A) covering twenty-nine single-spaced pages and dealing with twenty-three topics, all designed to secure the constitutional rights of Willowbrook residents to protection from harm. The judgment recites that these

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"are not optimal or ideal standards, nor are they just custodial standards. They are based on the recognition that retarded persons, regardless of the degree of handicapping conditions, are capable of physical, intellectual, emotional and social growth, and . . . that a certain level of affirmative intervention and programming is necessary if that capacity for growth is to be preserved, and regression prevented."

393 F. Supp. at 717, Consent Judgment at 3. The state officials agreed that "'within their lawful authority'" and "subject to any legislative approval that may be required," they would "take all actions necessary to secure implementation of" Appendix A as well as "all steps necessary to ensure the full and timely financing of this judgment," all in a prompt and orderly manner. *Id.*, Consent Judgment at 3-4.

Appendix A of the Consent Judgment describes the phasing in of various improvements with a thirteen-month period for implementation of many of the steps, standards, and procedures. These steps, standards, and procedures relate basically to programming, staff, and environment and mandate an "individual plan of care, development and services" for each resident, prepared by an interdisciplinary professional staff after comprehensive testing and evaluation. Consent Judgment at 5; at least six hours of programmed activity per week day, "individually designed and structured to increase the resident's physical, social, emotional or intellectual growth and development," each program including education, recreation, physical therapy, and speech pathology and audiology services.⁶ Appendix A at i; regulation of potential

⁶ Many of these retarded individuals have serious physical handicaps, including blindness or deafness and inability to walk, talk, care for themselves, or request care from others.

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abuse such as restraints, labor, aversive techniques, behavior modification, research, and medication, Appendix A, Sections N, P, and Q; specific ratios of attendants, supervisors, and clinical staff to residents, depending upon the condition of the resident, the type of building, and the time of day, *id.* Section C; and living facilities that will afford the residents "privacy, dignity, comfort and sanitation."⁷ *Id.* Section B(1).

But beyond the guidelines and requirements for the operation of the institution, Appendix A in Section V(9) provides: "The primary goal of Willowbrook and of the Department shall be to ready each resident, with due regard for his or her own disabilities and with full appreciation for his or her own capabilities for development, for life in the community at large." Moreover, Appendix A specifically calls for the deinstitutionalization of the residents of Willowbrook and their placement in more normal and less restrictive living situations in the community. It is thus provided that "[w]ithin six years from the date of this judgment, Willowbrook shall be reduced to an institution of 250 or fewer beds." *Id.* Section V(1).

OPERATIONAL STRUCTURE OF WILLOWBROOK

The Consent Judgment established an elaborate organizational structure, said to be unique in the country, for the purpose of ensuring that the defendants complied with the Consent Judgment; the structure specifically reflected the undesirability of requiring court intervention on every issue relating to the enforcement of the judgment, even though the court retained jurisdiction for the

⁷ It is significant that Willowbrook was so overcrowded and undermaintained that many of its toilet facilities were inoperable.

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purposes of construing, implementing, enforcing, or considering motions to amend the Consent Judgment.

The first and most important body established under the Consent Judgment is the Willowbrook Review Panel (the Review Panel). Approximately one-half of the provisions of the final judgment itself, as opposed to Appendix A, relate to the composition, duties, and operation of the Review Panel. The Review Panel consists of seven persons, three chosen by the plaintiffs and approved by the court, two chosen by the defendants and approved by the court, and two recognized experts in the field of mental retardation, one of whom is experienced in the management and operation of public institutions for the mentally retarded and the other in the establishment and operation of community facilities and care and placement of mentally retarded persons in them,⁸ chosen by agreement of the parties and approved by the court or appointed by the court from the parties' nominations in the absence of agreement. Broad responsibility for monitoring compliance with the terms of Appendix A is delegated to the Review Panel. It is to have a staff; and the Review Panel members and the staff are to have monthly compensation plus reimbursement for "reasonable out of pocket expenses in-

⁸ The Review Panel members are Dr. James D. Clements, Director of the Georgia Retardation Center (Atlanta, Georgia) and member of the President's Committee on Mental Retardation, Chairman; Murray B. Schneps, New York City attorney and father of a named plaintiff, Vice Chairman; Dr. William L. Bitner, III, president of a bank in Glens Falls, New York, and former Associate Commissioner, New York State Department of Education; James Forde, Deputy Administrator, San Diego County (California) Health Care Agency and former official in the New York State Department of Mental Hygiene; Linda L. Glenn, Assistant Commissioner for Mental Retardation Services, Massachusetts Department of Mental Health; Michael S. Lottman, Director of the Education Law Center, Inc. (Newark and Philadelphia); and David Rosen, Interim Director, Plymouth (Michigan) Center for Human Development, and Associate Administrator, Michigan Department of Mental Health.

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curring in performing the duties of the Review Panel." Consent Judgment at 6, appropriate office space, clerical staff, and other support services and equipment. The Consent Judgment requires the responsible officials and department heads or supervisors at Willowbrook to submit written reports to the Director of Willowbrook and to the Review Panel showing in detail the progress toward implementation of the judgment within the building unit or department supervised. The Review Panel staff is periodically to compile written reports showing the degree of progress. The Review Panel is allowed access to all information and buildings, as well as to all employees and members of the class; and interference with the Review Panel is punishable as contempt.

It is important to note that the Review Panel is required, by majority vote, periodically to make "written recommendations to defendants of steps deemed necessary to achieve or maintain compliance with the provisions of this judgment," including recommendations as to timetables as well as substantive recommendations. *Id.* at 8. The Review Panel is also to recommend resolution of disagreements concerning the interpretation or application of the steps, standards, and procedures in Appendix A. It is provided that "all parties to this judgment shall be bound by and shall implement the recommendations of the Review Panel" unless within fifteen days a party objects in writing to the recommendations and serves the objections upon other parties to the litigation. It is further provided that upon receipt of written objections the Review Panel may apply to the court for an order implementing the recommendations to which objection has been taken. Indeed, the very recommendation here involved is one that the Review Panel made, to which the state officials objected, and for the implementation of which the

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Review Panel applied to the court for an order allowing it to proceed.

Thus it can be seen that the parties knowingly and intentionally delegated to a panel of chosen experts the power to make the initial determination on important matters involving the meaning and interpretation of the Consent Judgment and Appendix A and more particularly the power to apply for enforcement of such recommendations.⁹ The record indicates that the Review Panel has made twenty-two recommendations since its inception. Acting upon a request of the Review Panel, the district court issued one order particularly construing the recommendatory provisions of the Consent Judgment even as it also ordered the implementation of certain substantive Review Panel recommendations regarding the removal of 140 persons from educational programming, the extension of psychiatric services, the development of a medical services plan, and the inclusion as class members of those nonresident individuals already placed in the community as of the commencement of the litigation. This order, issued by Judge Bartels, provided that

⁹ Appendix A gives the Review Panel serious other responsibilities and duties: Section D(4) requires Review Panel participation in the establishment of procedural mechanisms for appeal by a resident, parent, or guardian who disagrees with a resident's individual development plan; Section W(3), approval of hearing procedures for transfers from Willowbrook to another resident; Section E(2), review and approval of a staff orientation and training program; Sections S(2) and S(4), nomination of the members of the Professional and Consumer Advisory Boards which under Sections S(1) and S(3) are periodically to submit written reports to the Review Panel; Section W(5), evaluation of and recommendations concerning the appropriateness of using one particular state facility as a residence for class members; and Section V(6), preparation of and recommendation for implementation by defendants of a detailed, comprehensive "community placement plan" to meet the needs of class members for appropriate, deinstitutionalized residential settings. Appellees advise this court that the Review Panel has fulfilled all of these responsibilities.

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the formal recommendations of the Review Panel, except on issues dealing with points of law only, shall be deemed prima facie proper and correct, and the party objecting to all or any part of a formal recommendation must, simultaneously with such objection, demand in writing a hearing before the Court, at which such objecting party shall have the burden of coming forward and showing that such formal recommendation is improper.

New York State Association of Retarded Children, Inc. v. Carey, No. 72 Civ. 356 (E.D.N.Y. Feb. 8, 1977). If the objector meets the burden of coming forward, the Review Panel has the burden of establishing by a preponderance of the evidence the correctness and propriety of the recommendation.

The Consent Judgment, as elaborated on in Appendix A, also sets up a Consumer Advisory Board (CAB) and a Professional Advisory Board (PAB). The CAB, the staff of which is the subject of this appeal, is intended to provide input from the perspective of the residents and their families, persons not professionally involved in the operation of retardation programs. It consists of seven members including "parents or relatives of residents, community leaders, and residents or former residents."¹⁰ Consent Judgment at 23. The CAB participates in the development of Willowbrook's philosophy, goals, and long-range

¹⁰ The CAB presently consists of Elliot Aronin, Chairman, a certified public accountant who is a past president of the New York State Association of Retarded Children; Jerome Isaacs, a business executive and father of a named plaintiff; Anthony Pinto, a retired fire captain and president of the Benevolent Society, the parents' group at Willowbrook; Ida Rios, a teacher and parent of a named plaintiff; Hugh O'Donnell, a retired court official and a member of the board of the Benevolent Society; and Richard Surpin, codirector of a community organizing and planning project. At the time of this appeal, the CAB was one member short.

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plans; evaluates allegations of dehumanizing practices or other violations of individual or legal rights of the residents; and designates a member of the committee that passes upon requests to conduct aversive conditioning, behavioral research, or experimentation. The CAB's most important function is to act *in loco parentis* on behalf of residents whose interests are not actively represented by a parent, relative, legal guardian, or committee. These residents, known as "noncorrespondents," have no one to protect their interests or to represent them in connection with the various steps, standards, and procedures under Appendix A, especially the creation of an individual developmental plan and community placement. The CAB or its designee thus acts as the noncorrespondent's parent or relative. There are approximately six or seven hundred noncorrespondents who now reside in all parts of the state, and it is in order to carry out these *in loco parentis* duties that the CAB requested the additional staff assistance that is the subject of this appeal.

The PAB is also a source of outside input to the state officials operating Willowbrook, but it consists obviously of people who are "eminent professionals in relevant fields." Appendix A, Section S(4). Their duties include advising on professional programs and plans, budget requests and objectives, and investigation of alleged dehumanizing practices and violations of human or legal rights. The PAB must approve exceptions to certain of the required standards, steps, and procedures and like the CAB must approve aversive conditioning, behavioral research, and experimentation.

It is interesting to note that of the Review Panel's twenty-two formal recommendations and interpretations since it was fully constituted in July 1975, four have involved closing or keeping closed certain institutions as,

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for example, the closing within about two years of the Keener facility on Ward's Island, which housed exclusively members of the plaintiff class; the closing within fifteen days of the Hillcrest Unit of the Wassaic Developmental Center, which housed eight class members; and the immediate closing of the Gouverneur Unit of Manhattan Developmental Center, which housed about 160 class members. The Review Panel also recommended prohibiting the use of the Bronx Developmental Center as a residential center for members of the Willowbrook class. Other Review Panel recommendations included the hiring of a medical director at Willowbrook, the provision of educational programming for 140 residents, and the like, all significant matters pertaining to the operation of Willowbrook. Based upon fourteen major audits by the Review Panel of the degree of compliance by defendants, the plaintiffs-appellees filed a motion for civil contempt against three state officials on November 9, 1976; the parties settled the motion by a stipulation, which recited that there was non-compliance and a need for increased efforts to achieve compliance, and an order which prescribed new duties for defendants such as reviewing all municipal and state building codes and contracting with a private agency to take over five Willowbrook buildings.

The foregoing discussion is necessary to appreciate the limited nature of the order made below. It requires the hiring of five staff persons for the CAB (four professionals, *i.e.*, nonclerical, and one secretary), two of whom have already been retained as "consultants" but are actually working fulltime for the CAB.

DISTRICT COURT FINDINGS

At the hearing before the district court and in a supporting affidavit, Kathleen McKaig, the CAB's coor-

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dinator, estimated at 699 the number of noncorrespondent class members for whom the CAB must act *in loco parentis* as above described, including 377 at Willowbrook, 46 at other facilities in Staten Island, 178 in other boroughs, and 98 outside the New York City area, plus 300 other class members whose parents are either out of the state or the country. At the time of the hearing the members of the CAB included one member of the plaintiff class, three parents of class members, two community leaders, and an individual who had just been appointed. With the exception of one member who is retired and thus able to spend forty hours a week at Willowbrook, the members are able to devote only five to fifteen hours per week to CAB activities because they all have full-time jobs. The CAB meets as a body once a month, and its subcommittees also meet on a monthly basis. But according to the district court's findings, "as a practical matter the seven members of the Board . . . cannot be expected to carry out the functions entrusted to them without considerable assistance." *New York State Association for Retarded Children, Inc. v. Carey*, No. 72 Civ. 356 (E.D.N.Y. Mar. 23, 1978), at 12. The coordinator reviews reports of abuse and neglect at Willowbrook, but there is no one to do the same for class members at facilities in other boroughs or upstate. Twelve to fourteen hours of staff time is required for each transfer to community placement, amounting to about ninety hours per month for a total of eighty-six transfers so far proposed; but as the number of community transfers increases this figure will increase. An additional 180 hours per month of staff time is spent following up on the community placement of noncorrespondent class members, the goal being to visit each noncorrespondent once every three months and to spend two to four hours per visit with the resident unless there are

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serious problems requiring more time. The staff of three is presently available to visit about twenty residents per month each.

Moreover, on a daily basis the CAB should be attending an average of four individual development plan conferences, but as presently constituted the CAB is actually able to attend only a third of the conferences and has not been able to serve at all the class members residing upstate; even at Willowbrook itself the CAB is able to attend only half of the conferences, and there was evidence that preparation for the conferences was not as thorough as it should be. Two typical case reviews are appended hereto as an appendix to indicate the nature and scope of each person's problems. Judge Bartels found that "[t]he basic responsibilities of the additional staff would be to permit the CAB to carry out its *in loco parentis* responsibilities with respect to all of the roughly 700 noncorrespondent class members." *Id.* at 6.

The Department of Mental Hygiene rejected the Review Panel's recommendation for additional CAB staff alleging that the CAB had an inflated view of its functions under the Consent Judgement, that the staff would duplicate the efforts of other supervisory bodies, that the Consent Judgment did not require the State to provide staff for the CAB, that the Review Panel had no authority to recommend staff because the Consent Judgement did not provide for CAB staff, and that court enforcement of the recommendation would go beyond the scope of the State's consent to the judgement and require expenditures from the state treasury in violation of the Eleventh Amendment.

Judge Bartels found that the argument that the CAB had an exaggerated view of its general functions had "very little persuasive force" because the CAB's jurisdic-

tion is "quite extensive." *Id.* at 7-8. He particularly cited the power of the CAB to evaluate dehumanizing practices and violations of civil rights which necessarily included the power to investigate as well as to coordinate. In any case he found undisputed the testimony of the CAB coordinator that the CAB and its present staff are not completely performing even the precisely specified *in loco parentis* functions. He found in this connection that the CAB is trying to do what the court "would require of it under any circumstances," *id.* at 9, involving a thorough job knowing the individual noncorrespondent and his or her developmental plan. The State argued that the CAB had failed in its "'mission . . . to organize local parent advocacy groups,'" *id.*, such as the one that has worked well at the Rome Development Center; but Judge Bartels found that there was no such mission under the terms of the Consent Judgment, although the CAB's authority to develop and rely on volunteer groups could be inferred. Under Appendix A, in fact, Willowbrook itself was to expand the volunteer programs, and the state officials were to apply for federal funding for a foster grandparent program. Although the CAB would appropriately assist in developing these programs, Judge Bartels noted that the CAB's lack of reliance on volunteer groups was not a ground for denying additional staff. As to the State's complaint that the CAB members overrely on staff, doing very little of the investigation themselves and delegating the responsibility for attending individual case conferences instead of themselves attending, the judge found that the members, all but one of whom are employed fulltime, could not be expected to carry out the CAB functions without considerable assistance. The judge also rejected the state officials' argument that the various other legislative bodies that have supervisory duties over the condi-

tions at Willowbrook would make any expansion of the CAB staff unnecessary; because none of these bodies has the specific *in loco parentis* responsibilities of the CAB and none of them is responsible to the court, Judge Bartels found that there was no duplication of effort.

The judge further found that the cost of compliance by the State would be approximately \$130,000 per year. This figure is about one-third of one percent of Willowbrook's annual budget of \$41 million, although still not a completely insignificant amount when viewed in light of New York State's overall budgetary problems of recent years.

A recitation of the above findings, none of which the State argues is not supported by sufficient evidence, leads us to a review of the judge's legal rulings. Judge Bartels ruled on alternative grounds, limiting himself on the first to construction of the Consent Judgment as written under the "four corners" rule enunciated in *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); see also *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975). The judge thus held that the provision of the Consent Judgment requiring the State to pay the CAB's "reasonable expenses" included reasonable expenses necessary for carrying out the CAB functions and that because he found the staff necessary to the CAB's carrying out its functions "reasonable expenses" included staff expenses. He held alternatively, however, that the evidence adduced would justify a modification of the Consent Judgment if appellees had properly brought a motion to modify; the judge relied upon a court's inherent power under *System Federation No. 91, Railway Employees' Department v. Wright*, 364 U.S. 642 (1961), and *United States v. Swift & Co.*, 286 U.S. 106 (1932), to modify the Consent Judgment because of the court's continued supervision over the implementation of the judgment. See also

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King-Seeley Thermos Co. v. Aladdin Industries, Inc., 418 F.2d 31 (2d Cir. 1969).

The judge also rejected the defense that the Eleventh Amendment barred the relief that the plaintiffs sought. He ordered and enjoined the state officials to take all action necessary to secure implementation of the Review Panel's recommendation, within their lawful authority and subject to any legislative approval that may be required, and to take all steps necessary to ensure the full and timely financing of the recommendation including, if necessary, submission of appropriate budget requests to the legislature.

DISCUSSION

The State first argues that the court misinterpreted the Consent Judgment by treating expenses for staff as "reasonable expenses" of the CAB for which reimbursement is required. The plaintiffs-appellees do not seriously dispute the State's argument in this respect, and we incline to accept it: the reasonable expenses contemplated are the expenses of the individual members in carrying out their own functions and do not involve the hiring of staff. Nor do we reach the trial court's alternative holding that (1) the Review Panel's recommendation can be treated as a motion to amend the Consent Judgment and (2) the findings at the hearing would satisfy the requirement of a hearing on such modification. The Consent Judgment spells out the procedure for modifying the judgment itself, and that method was not followed here.

Rather, we rely on an interpretation of the Consent Judgment itself but one that is broader than the State's. This Consent Judgment was, as we have attempted to explicate above, complex and ongoing in nature. The judgment contemplated changing conditions. It was inevitable

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that situations would arise that the terms of the judgment, however specific, did not address and that implementation of the judgment would require further refinement of the terms. But the parties did not contemplate frequent resort to the court to interpret the meaning of and ensure compliance with the Consent Judgment. Instead, they created continually evolving enforcement and supervisory mechanisms, including the Review Panel, the CAB, and the PAB, in order to take such changed conditions into account and to assure respect for the constitutional rights of the Willowbrook residents and non-correspondents. The elaborate system established to meet evolving conditions and to resolve differences, together with the supervisory and recommendatory role of the Review Panel, requires a degree of flexibility in enforcement of the judgment that does not result in a modification; the flexibility is within "the four corners" rule of *Armour, supra*, because the Consent Judgment itself provides for it. The Consent Judgment is no mere contract, even though reference to contract principles may be useful. *United States v. Swift & Co., supra*, at 115. We may look at "the circumstances surrounding the order and the context in which the parties were operating." *United States v. ITT Continental Baking Co., supra*, 420 U.S. at 243, without in any way departing from the "four corners" rule of *Armour, see id.* at 238.

The "steps, standards and procedures" language in the Consent Judgment specifically permits the Review Panel to recommend additional steps where necessary to achieve or maintain compliance with the provisions of the Consent Judgment. The authority to make recommendations appears to us to be a well-constructed mechanism for flexible yet orderly and effective implementation and dispute resolution. These recommendations are especially appropri-

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ate where, as here, at the time that the parties signed the judgment it would have been extremely difficult to know the scope of the CAB's duties, the number of residents on whose behalf they would have to act, and how effective the CAB would be. Under the express findings of the district court, the CAB in order to function according to the terms of the Consent Judgment must have this limited amount of staff. We believe that the Consent Judgment authorized the Review Panel's recommendation as an exercise of the prospective, independent, and creative powers that the judgment accorded to the Review Panel. Even if the provision requiring the State to pay the reasonable expenses of the CAB members does not include expenses for staff, the provision authorizing the Review Panel to recommend steps to implement the judgment does include such expenses; and we can thus derive our construction of the Consent Judgment as requiring the payment of these expenses strictly from within the four corners of the judgment itself.

It is interesting that the parties have also construed the Consent Judgment to permit wide-ranging Review Panel recommendations and flexibility in the interpretation of the means of compliance. Not only has the Review Panel made formal recommendations and interpretations, but it has made a number of informal ones also; yet the threat of the contempt power has been used in aid of enforcement hardly at all. The advice, intervention, and assistance of the Review Panel has been of utmost importance in the ongoing attempt to implement the Consent Judgment. Indeed, in terms of the CAB itself, as its responsibilities were more precisely defined and expanded by experience, the State agreed (albeit under protest) to pay the salaries for a coordinator and a secretary; it later agreed to allow the CAB to hire two consultants. *See also*

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United States v. Atlantic Refining Co., 360 U.S. 19, 22 (1959); *Sanchez v. Maher*, 560 F.2d 1105 (2d Cir. 1977).

We agree with the district court that the absence of an explicit reference to "staff" in the provisions of the Consent Judgment relating to the CAB is not fatal to the recommendation; rather the absence indicates, as Judge Bartels found, that the parties did not have a "fully comprehensive conception of how to deal with the problems the CAB would face."¹¹ The evolutionary and creative powers of the Review Panel agreed upon the Consent Judgment, coupled with the affirmative acts of the parties defining the role of the CAB that made staffing necessary, mandate enforcement of the Review Panel's recommendation for CAB staff. In short, we treat the organizational structure established under the Consent Judgment—a Review Panel with the power to recommend interpretations of the judgment and methods of implementing it—as analogous to the powers granted, say, to Congress under Section 5 of the Fourteenth Amendment to effectuate the matters of substance and procedure contained in the first four sections of that amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976). That is to say, there is a self-executing mechanism for flexibility built into the Consent Judgment, the operation of which, as the court below found, was clearly reasonable in this case and is entitled to be upheld. Judge Bartels' order enforcing the recommendations of the Review Panel was, in this light, certainly not clearly erroneous. The fact that we reached the same result through somewhat different reasoning does not preclude us from affirming his deci-

¹¹ The State's contention that the Consent Judgment obligates the members of the CAB to carry out their guardianship responsibilities personally is rebutted by Section W(7) of Appendix A, which recognizes that the CAB may discharge its duties as *in loco parentis* through "designees."

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sion. *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Lum Wan v. Esperdy*, 321 F.2d 123, 125-26 (2d Cir. 1963). Under Judge Bartels' earlier interpretive order, when the Review Panel so recommended, it established a prima facie case of such need. Without indicating expressly that the State had failed to produce sufficient evidence to meet that prima facie case, the district court nevertheless made it quite clear that the Review Panel had sustained its burden of persuasion in showing that the CAB needed the staff in order to implement the judgment and secure the constitutional rights of hundreds of retarded persons.

The State's second objection on appeal is that the district court's order is vague and unenforceable and lacks compliance with Fed. R. Civ. P. 65(d). See also *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). The state officials are concerned, they allege, because the district court has provided no guidance as to what specific actions they are to take after their request to the legislature for appropriations and whether, if the request is unsuccessful, what further action would be sufficient. But at the same time the State points out that a number of options appear to be available to comply with the order, including requests in the supplemental budget under New York Constitution Article 7, Sections 3 and 4. Moreover, the State claims that there are only three potential sources of funds available that it may use to fund CAB staff: the budgets of the other twenty-one developmental centers in the state, funds already designated for programs for the developmentally disabled, or funds from the executive management budget.

We do not think the order lacks specificity. It compels appellants to assure approval and funding for four full-time professional staff positions and one full-time secre-

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tarial position for the CAB. The order leaves it to the state officials themselves to determine the exact means by which to implement the order, appropriately wary of superfluous state officials in the proper performance of their governmental functions. *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd on other grounds sub nom. Alabama v. Pugh*, 98 S.Ct. 3144 (1978).¹² In our view, Judge Bartels properly deferred to the state officials and legislature in the hope that they will meet their constitutional obligations by whatever methods necessary and desirable. The order compels the state officials to use their best efforts to accomplish the injunctive relief granted. See *Brown v. Board of Education*, 349 U.S. 294 (1955); *Wyatt v. Stickney*, 344 F. Supp. 373 (N.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

Of course, as the district court warned, the defendants may not obtain compliance through the sacrifice of other programs and services for the mentally retarded; but it does not appear conclusively from this record that all moneys in the New York State Office of Mental Retardation and Developmental Disabilities' budget are devoted to the provision of direct services and care for clients, nor does it necessarily appear that reallocating \$130,000 from program or facility budgets would inevitably decrease the level or quality of services. The Governor, moreover, who is a defendant, has substantial flexibility in the use of transfer of money from the state treasury and is apparently not limited under New York State Finance Law § 51

¹² Unlike the "Human Rights Committee" that the Fifth Circuit dissolved in *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd on other grounds sub nom. Alabama v. Pugh*, 98 S.Ct. 3144 (1978), the Review Panel was not a creature of the district court; rather, the parties in settlement of pending litigation agreed to its creation, duties, powers, and responsibilities.

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in reallocating funds. Finally, the operative language of the court order is essentially a verbatim recitation of portions of the Consent Judgment itself, which the State has to date construed as providing sufficient guidance with respect to implementation and which indeed is language that the State itself helped to draft.

The State's argument based on the Eleventh Amendment as applied in *Edelman v. Jordan*, 415 U.S. 651 (1974), to bar an award of monetary damages directly out of the state treasury for the purpose of compensating past wrongs is not applicable to this case. Here involved is purely prospective relief applied to meet the requirements of constitutional law. The order challenged here requires no more qualitatively, and a good deal less quantitatively, than the order in *Milliken v. Bradley*, 433 U.S. 267 (1977), see *id.* at 289-90. See also O. Fiss, *The Civil Rights Injunction* (1978) (*passim*). To bar a federal court decree of this nature because of its incidental fiscal consequences would immunize state officers from the duty of prospective adherence to federal statutory and constitutional requirements. Cf. *Hutto v. Finney*, 98 S.Ct. 2565 (1978) (award of attorney's fees not prohibited by Eleventh Amendment although payable out of a state departmental budget). See also, e.g., *Todaro v. Ward*, 565 F.2d 48 (2d Cir. 1977). Moreover, the consent judgment itself would constitute a waiver of Eleventh Amendment immunity if we are correct, as we believe that we are, in our construction of it as itself requiring the State to provide CAB staff in accordance with a Review Panel recommendation for staff as necessary to implement the Consent Judgment.

The judgment accordingly is affirmed.

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APPENDIX

Included in the record on appeal are 35 individual habilitation plans and 27 case reviews for residents of the Rome Developmental Center. We attach as an appendix to this opinion two case reviews as typical of those in the record and, we suspect, of the residents at Willowbrook.

FORM 67 MED 2-75

State of New York—Dept of Mental Hygiene

INTER-DISCIPLINARY NOTES

Name of Facility: Rome Developmental Center

Name of Resident: Richard 225

Consecutive No.: 020 621

D.O.B.: 12/16/61

D.O.A.: 8/17/65

December 14, 1977 CASE REVIEW

PRESENT: Dr. Wilkie, Mrs. Evans, Mr. Beatty, Mrs. Baranowski, Mr. Diorio, Mrs. Curtacci, Mrs. DiAcunto, Mrs. Frick, Mrs. Duell, Mrs. Shortell, and Mr. Premo

ABSENT: Mr. Shortell, Mr. [illegible], and Mrs. Smith

Medical: Current Medications: Phenobarbital and Phenytoin for seizures—no seizures recorded since 9/30/77. Hal-dol—behavior problems—occasionally gets upset and self-abusive according to TA I

Illnesses or medical disorders in past 6 months: 10/77—Possible TM perforation, 10/77—traumatic lesions in ear canal, 9/30/77—LOMAC, 9/30/77—status epilepticus, 9/77—behavior problem, 8/77—superficial scratches on left sole, 8/77—laceration

Recommendations: Continue present medications

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Living Unit: Richard enjoys attention and is usually well behaved. However he does at times become very self abusive. He crawls around the dayroom, appearing to explore his environment. During this exploration he does climb in and out of chairs, thereby, exhibiting some motor refinement. He appears to be a happy child within his own world and occasionally interacting with other children.

Jon Premo, TA

Social Service: Richard is a 15, almost 16, year old boy who was admitted to RDC in 1965 at the age of 3 years—8 months from Washington County. Legal status is Non-objecting. Mental Retardation Diagnosis is 314.60: Profound Retardation, Associated with Prematurity. Dickie's mother, Mrs. Patricia _____, continues to live in Massachusetts. She does not visit her son or correspond with Building 22. Mrs. _____ has been made aware of the possibility of an Interstate transfer as well as the possibility of re-settlement at Wilton and has not responded to related correspondence. The latter move would appear to no longer appear to be a possibility due to the fact that no relatives remain in the Wilton area (see Jan. 1976 correspondence in record from Dale E. Harro, M.D., Deputy Director of the Wilton facility). Worker has the opportunity to visit Dickie frequently. He is a legally blind boy who is unable to walk although he gets around quite well by crawling. He has no speech but will "parrot" a few words and/or sounds. Dickie has a minimal awareness of his environment and he exhibits very little interest in people, objects or occurrences. He continues to have occasional periods when he is distressed and self-abusive. This behavior is never intentionally directed at others. He

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is included in all Living Unit Program and Activities and is receiving SSI Benefits.

Discharge Plan: Richard requires medical care and habilitative programming to a degree not presently available in the community. Worker feels that, given these circumstances, Richard is appropriately placed on Living Unit 225.

(Sgd.) Patsy Evans, Social Worker

Recreation: I have stopped seeing Richard on an individual basis. He is still involved in Unit recreation activities and recreation bus rides. Will continue Richard's present programs.

Charlene Baranowski, Rec. Therapist

Food Service: Diet—soft; height: 150 cm; weight: 37 Kg. Supplement—Poly-Vi-Flor; anti-constipation #2

Richard is a dependent eater. His eating skills have not improved a great deal. His height and weight have changed very little. There was a loss of .2 Kg. since the last review. There are no recommendations.

Margaret Curtacci, Dietician

School: Richard's play and social behaviors usually involve balls or noise making activities. He throws a ball (but not aimed at anyone because he is blind). He also enjoys playing with toys that he can hit on the floor or shelves to make noise. Richard "bounces" a ball by dropping it and catching it. Richard likes tactile stimulation such as sand play. Richard can remove all his clothing and can pull up his underpants and slacks from the knee. Richard has a small imitative vocabulary but words usually must be shouted at him and he shouts them back in a

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definite rhythm and pitch. Richard will respond to other children only when they touch him. He responds well to adults but does not seek attention. He is non-ambulatory, but gets around well by sliding or crawling. He occasionally throws tantrums during which he throws things and is self-abusive.

Recommendations: Richard should attend school in Bldg. 54 as soon as there is an opening for him.

Karen Shortell, *Teacher IV*

Recommendations: Continue present medications. Continue present programs.

FORM 67 MED 2-75

State of New York—Dept of Mental Hygiene

INTER-DISCIPLINARY NOTES

Name of Facility: Rome Developmental Center

Name of Resident: Diane 221

Consecutive No.: 019 525

D.O.B.: 12/7/57

D.O.A.: 5/28/62

December 14, 1977 CASE REVIEW

PRESENT: Dr. Wilkie, Mrs. Frick, Mrs. Evans, Mrs. DiAcunto, Mrs. Curtacci, Mr. Beatty, Mrs. Comito, Mr. Nadeau, Mr. Dhalle, Mr. Diorio, Mrs. McGregor

ABSENT: Mr. Shortell, Mr. Gifford, and Mrs. Smith

Medical: Current Medications: Phenobarbital and Phenytoin for seizures—last recorded seizure 11/16/77.

Ascorbic Acid for gingivitis—reportedly gums still bleed, Mellaril for behavior—behavior good sometimes and not good other times, Chloral Hydrate—sleeping—LPN has not heard recent complaints about her not sleeping.

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Illnesses or medical disorders in past 6 months: 8/77—hair loss, 7/77—gingival hypertrophy and inflammation, Edema of cheeks, etio?

Recommendations: Continue present medications. Increase H.S. medication—Chloral Hydrate.

Living Unit: Diane is a profoundly retarded 20-year-old female who is legally blind and non-ambulatory. She is included in all activities with minimal awareness. Diane's feeding program has improved through the use of tongue walking, used to eliminate tongue thrust. She is in a range of motion program daily with O.T./P.T. and Unit staff and has shown little improvement but maintained present status.

Diane frequently appears to be very sleepy during the day and when awake, she often makes noises with loud outbursts.

Helen Smith, *TA*

Social Service: Diane is a 20 year old female who was admitted to RDC in 1962 at the age of 4 years—6 months from Herkimer County. Legal status is Non-objecting. Mental Retardation Diagnosis is 314.40: Profound Retardation, Associated with Diseases and Conditions Due to Unknown Prenatal Influence, Not further specified. Diane's mother, Mrs. George _____ continues to live in Old Forge, N.Y. She does not visit her daughter or maintain contact with Building 22. Worker has the opportunity to visit Diane on a regular basis. She is a multiply handicapped girl who was declared legally blind in 1975. Diane remains very inactive exhibiting very little awareness of her surroundings. She does not respond to her name or individual attention nor is there any peer interaction. Drowsiness during the day, with wakeful nights,

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continues to be a problem. Diane is included in all Living Unit Programs and Activities. She continues to receive Social Security Benefits as well as V.A. Benefits.

Discharge Plan: Diane requires medical care and habilitative programming to a degree not presently available in the community. Worker feels that, given these circumstances, Diane is appropriately placed on Living Unit 221.

(Sgd.) Patsy Evans, *Social Worker*

Recreation: Diane participates in bus and van rides, music and mat therapy, picnics, recreation activities on the ward and recreation room.

*Goals—*To get response to vestibular stimulation: *Method—*use of glider, swing, air flow mattress. Increase awareness of tactile stimulation: *Method—*play with textured objects such as snow, water play, shaving cream and play doe.

Ralph Nadeau, *Sr. Recreation Therapist*

Food Service: Diet—fine ground; height—137 cm.; weight—34 Kg. Supplement—Poly-Vi-Flor, anti-constipation program #2.

Diane is a dependent eater. The tongue walking technique is used in feeding her with a zylon spoon. She has gained 2 Kg. since her last review 6/21/77. There are no recommendations.

Margaret Curtacci, *Dietician*

School: Progress is minimal. Diane is extremely lethargic and unresponsive to program intervention.

Recommendations: Continue in program.

Paul Dhalle, *Teacher*

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O.T./P.T.: Diane was evaluated on 12/9/77 for reflex, gross and fine motor development.

*Reflex—*Diane exhibits a negative supporting reaction in standing at the brain stem level and body righting acting on the body and labyrinthine righting acting on the head at the midbrain level. She has no protective extension in sitting but has cortical equilibrium reactions in prone, supine, and sitting.

*Gross Motor—*Basic posture and alignment—Diane has a slight curvature of the spine to the left in the lumbar area. She sits with both legs externally rotated and flexed. Diane is able to raise her head from a prone and supine position (7 mos.) She has head control in sitting. She can roll from prone to supine toward the right (5 mos.) She can maintain a prone on elbows position with stability in bilateral weight bearing, but cannot assume this position. She can get from lying to sitting (10 mos.), sitting to lying and can maintain a tailor and ring sitting position. She can sit steadily for ten minutes, can lean forward and recovers her balance (9 mos.).

*Fine Motor—*Diane is blind—has no blink response, focusing, etc. No grasp reflex is present in the hands; hands are predominantly open (3 mos.). She does not hold anything in her hands.

Diane is positioned in her wheelchair for meals and other activities. In the feeding program we are working to decrease her tongue thrust and get lip closure. She is in the range of motion program.

Judith Belile, *O.T./P.T.*

Recommendations: Increase H.S. medication (Chloral Hydrate). Continue other medications. Continue present programs.

Appendix B - Opinion United States
District Court, Eastern
District of New York

RECEIVED
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MAR 27 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEW YORK STATE ASSOCIATION FOR
RETARDED CHILDREN, INC., et al.

DEPARTMENT OF LAW
NEW YORK CITY OFFICE

and

PATRICIA PARISI, et al.,

Plaintiffs,

72-C-356

-against-

72-C-357

HUGH L. CAREY, individually and as
Governor of the State of New York,
et al.,

Defendants.

UNITED STATES OF AMERICA,

Amicus Curiae

Appearances:

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BARTELS, District Judge

This is a motion by the Department of Mental
Hygiene (Department) ^{1/} to reject a formal recommendation by
the Willowbrook Review Panel issued pursuant to ¶ 8(b) of the
Consent Judgment of April 30, 1975, that the Department approve
and fund four professional staff positions and one secretarial
position for the Consumer Advisory Board (CAB). ^{2/} The recom-
mendation is supported by all of the plaintiffs and by the
United States as amicus curiae. A hearing on the Department's
objections to the recommendation was held on January 27,
February 1 and February 8, 1978, at which four witnesses for
the Department and three witnesses for the Review Panel
testified.

I

A brief preliminary description of the Willowbrook
Review Panel and the Professional Advisory Board (PAB), the
other bodies established by the Consent Judgment, is neces-

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sary to place the instant dispute and the role of the CAB into context. The Willowbrook Review Panel is a seven member body with prime responsibility for investigating and reporting on the degree of the defendants' compliance with the Consent Judgment and for making recommendations, formal and informal, to the defendants as to the implementation of the Judgment. The PAB also consists of seven members, and provides a consultant resource on technical matters to the various entities involved in the action. It has the responsibility of investigating dehumanizing practices and violations of civil rights and is to review research proposals and projects, advise the director of Willowbrook Developmental Center, and submit quarterly reports.

The focus of the dispute, the CAB, is a seven member panel made up of parents or relatives of residents, community leaders and residents and former residents of Willowbrook. Its responsibilities include evaluation of alleged dehumanizing practices and/or violations of individual or legal rights. It shall participate in the development of Willowbrook's philosophy, goals and long-range plans, advise the Director, submit quarterly reports, and, along with the Director, is to prepare a list of the civil and legal rights of the residents. The CAB is also to act in

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loco parentis^{3/} for residents such as orphans whose interests are not actively represented by a parent or guardian ("non-correspondent residents") with respect to certain provisions of the Consent Judgment. In carrying out its responsibilities, the CAB has access to living and program areas and, in cooperation with the defendants, to resident care records. The CAB is to coordinate its efforts with both visitor and parent organizations.

In January 1976 the CAB adopted a statement of its rights, duties and responsibilities prepared for it by counsel for one of the plaintiffs herein. This statement included a list of staff and supply requirements deemed necessary to carry out such functions and was forwarded to the Commissioner of Mental Hygiene. Shortly thereafter, the Department, although pointing out that the Consent Judgment made little or no provision for the Department to provide the services requested, informed the CAB that it would consider its request and make appropriate recommendations to the Division of the Budget. In May 1976 Commissioner of Mental Hygiene Coughlin stated that the state was prepared to provide a full-time coordinator, consultants, office space and a secretary to the CAB. The CAB accordingly hired

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a coordinator, Ms. Kathleen McKaig, a secretary, and two "consultants," who are actually working as full-time staff to the CAB rather than as occasional consultants.

Ms. McKaig testified that one of the CAB members spent about 40 hours per week monitoring conditions of life at Willowbrook and working with the administration there to correct harmful conditions. Ms. McKaig also spent about 4 hours per week reviewing abuse and neglect reports at Willowbrook, and she indicated that a similar time commitment could well be made at state facilities in other boroughs as well as upstate, where a number of Willowbrook class members reside.^{4/} Some 12 to 14 hours of staff time, she continued, must be spent for each transfer to a community placement, amounting to about 90 hours per month for a total of 86 non-correspondent class members to date. She anticipated that this figure would increase as the rate of community transfers increased. Ms. McKaig also indicated that about 180 hours per month of staff time was spent following up on the community placements of non-correspondent class members. The goal was to visit each non-correspondent once every three months, spending 2-4 hours per visit with the resident, unless there were transitional problems, where significantly more time had

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to be devoted to the resident. The staff of three is presently able to visit about 20 residents per month each.

On a daily basis, Ms. McKaig indicated, the CAB should be attending an average of four individual development plan conferences,^{5/} but in actuality the CAB is able to attend only a third of the conferences and has been able to do nothing for the class members residing upstate. According to Ms. McKaig, even at Willowbrook itself only half of the conferences could be attended, and preparation for the conferences was not as thorough as it should be. The basic responsibilities of the additional staff would be to permit the CAB to carry out its in loco parentis responsibilities with respect to all of the roughly 700 non-correspondent class members.

II

The Department of Mental Hygiene rejected the Review Panel's recommendation that the additional staff for the CAB be approved and funded, giving five reasons: (1) the CAB's request for additional staff reflected an inflated view of its functions under the Consent Judgment; (2) additional staff would be unnecessary and would result in duplication of efforts by the CAB, the PAB and the Review Panel; (3) the

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Consent Judgment does not require the state to provide staffing for the CAB; (4) the Review Panel had no authority to make the recommendation because there is no provision for staff in the Consent Judgment; and (5) court enforcement of the recommendation would go beyond the scope of the state's consent to the decree and cause a drain on the state treasury in violation of the Eleventh Amendment. These objections will be reviewed below, although not necessarily in the above order.

Scope of CAB Functions

The Department's claim that the CAB has an inflated view of its functions is based in large part on the statements in Ms. McKaig's affidavit that she spends 75-80% of her time making sure people in the institution are kept alive and protected from harm, and helping people to make successful transitions out of the institutions and into community placement. The Department also introduced into evidence a few letters which the CAB had written on behalf of two departmental employees and one by Dr. Clements, chairman of the Review Panel, which suggest that the CAB was involving itself in matters falling outside its specific parameters.

Arguments that the CAB has an exaggerated view of its general functions have very little persuasive force, for

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the jurisdiction of the CAB is quite extensive, as Steps, Standards and Procedures S.1 and S.5 indicate. In particular, the court believes that the power of the CAB to "evaluate" dehumanizing practices and violations of civil rights necessarily includes the power to investigate such practices where necessary, although it will not normally be the function of the CAB to undertake such investigations in the first instance. Of course, in the exercise of its functions, the CAB must coordinate its activities with the other judicially and legislatively established bodies which have jurisdiction over various aspects of the Willowbrook class and in general exercise a reasonable discretion in the use of its necessarily limited resources.

In any case, Ms. McKaig's testimony that the CAB and its present staff are not completely performing even the precisely specified in loco parentis functions is undisputed. However, the Department argues that this is not caused by a shortage of staff but rather results from (1) the CAB's efforts to perform too many tasks under these provisions; (2) the practice of the CAB to have its staff, and not its members, do most of the fieldwork; and (3) the failure of the CAB to have adequately developed and utilized parent and volunteer groups in the exercise of these functions.

The evidence does not persuade us that the CAB is guilty of attempting too much in the exercise of its in loco parentis functions. Instead it appears to the court that the CAB is doing what the court would require of it under any circumstances--a thorough job knowing the individual non-correspondent resident involved and his developmental plan or, as the case may be, becoming familiar with the facility to which he is to be transferred. We also do not believe it is improper for the Board to devote additional time to non-correspondents who are having difficulties in adapting to the transfer, if such attention is deemed necessary and an appropriate utilization of its resources.

Parent and Volunteer Groups

The Department focussed a good deal of attention on its claim that the CAB has failed in its "mission . . . to organize local parent advocacy groups" whose members would be able to assist in the representation of non-correspondent members of the class. The testimony showed that such a parent group is working well upstate at the Rome Developmental Center, with volunteer parent advocates appearing at all important conferences on behalf of non-correspondent residents there. However, under the terms of the Consent Judgment, the CAB has

no explicit mandate to develop and rely on parent or volunteer groups, although authority to do so can be inferred from its duty to coordinate activities with such groups. In fact, under Steps, Standards and Procedures S.6 and S.7, it is incumbent on Willowbrook to expand its own volunteer program and on the defendants to apply for federal funding for a foster grandparent program for Willowbrook which, to this date, is not yet fully developed. While it would be appropriate for the CAB to assist in development of parent and volunteer organizations, the CAB cannot be denied additional staffing on the ground that it has failed to rely on such groups.

Moreover, the testimony revealed that efforts have been made to establish relations between the CAB and other parent groups but that instead of being of assistance to the CAB, these parent groups more often needed and relied on assistance from the CAB. One of the problems with using parental groups is that parents understandably are more interested in concentrating on the problems of their own child. It does appear, however, that the Benevolent Society for Retarded Children is very active at Willowbrook and that perhaps more efforts should be made by the CAB to establish working relations with this organization. The court recog-

nizes the accomplishments of the Parent Advocates at Rome Developmental Center, but the court does not believe that the conditions at Rome are comparable to the conditions affecting the non-correspondent Willowbrook class members, who are scattered in facilities throughout New York City and in a number of institutions upstate.^{6/} We further note from Ms. McKaig's testimony that otherwise valuable services or clinical social work students had to be rejected because she was unable to provide supervision.

Overreliance on Staff by the CAB

Not only does the CAB underutilize community and parent resources in carrying out its functions, the Department complains, it also overrelies on its staff, especially in carrying out its in loco parentis functions, which results in inefficiency, overprofessionalization and a loss of the point of view of the concerned layman the CAB is supposed to represent. The evidence shows that except for Mr. Pinto members of the CAB actually do very little of the investigation, attendance at individual case conferences, etc., and delegates this work almost entirely to Ms. McKaig and the other staff members. More staff would not be needed, the Department argues, if the members themselves did more of the work.

While the court is of the opinion that all members of the Board should have as much personal contact with the Willowbrook class members as possible, it recognizes that as a practical matter the seven members of the Board, six of whom have full-time jobs, cannot be expected to carry out the functions entrusted to them without considerable assistance. The magnitude of the problem makes this self-evident. When and if parent and other voluntary groups are able to take over some of the in loco parentis and other duties of the CAB, the necessity for additional staff may be proportionally reduced. In the meantime, the obligations must still be fulfilled, and if the resources of volunteer organizations are not available, which the court finds to be the case now, recourse must of necessity be had to professional staff.

Duplication of Efforts

The Department also points out that in addition to the supervisory bodies established by the consent decree, there are a number of legislative bodies which supervise the quality of care of Willowbrook residents: the Mental Health Informations Service (N.Y. Ment. Hyg. L. § 29.09); the Board of Visitors (N.Y. Ment. Hyg. L. § 7.19); the Commission on the Quality of Care (N.Y. Ment. Hyg. L. § 45.07); the Division of

Post Institution Service of the Department of Social Services (N.Y. Soc. Serv. L. § 62); and the Protection and Advocacy System for Developmental Disabilities (42 U.S.C. § 6012). This plethora of supervisory bodies, the Department argues, makes an expansion of the CAB's staff unnecessary. However, none of these bodies has the specific in loco parentis responsibilities of the CAB which demand so much of the CAB's time. Moreover, none of these bodies are responsible to the court, nor is their efficacy known to the court. Insofar as other functions of the CAB overlap with those of the Boards of Visitors or the Mental Health Information Service, which existed prior to the signing of the Consent Judgment, and with those of the Review Panel and the PAB, the overlap was obviously intended by the parties. Indeed, some overlap, especially in the area of investigation and remedy of resident abuse, is apparent in the legislative structure itself. Of course, redundancy of effort--of which there appears to be little, if any--should be avoided by coordination, as discussed above. However, if the Department sincerely feels that the activities of the CAB are superfluous, it is remitted to a frontal attack upon the problem by moving for a modification of the Consent Judgment rather than an indirect attack upon the CAB's functions. We note in passing that the

newly created State Commission on Quality of Care for the Mentally Disabled will, effective April 1, 1978, have the power to provide staff and other necessary assistance upon request to Boards of Visitors, the state body most similar to the CAB. N.Y. Ment. Hyg. L. § 45.02(e)(2).

III

With this background in mind we turn now to those provisions of the Consent Judgment most closely related to funding of the CAB and to the law to be applied in construing or modifying consent decrees.

Paragraph W.8 of the Steps, Standards and Procedures is the only provision which deals with funding for the CAB. It reads: "Members of the . . . Consumer Advisory [Board] shall be reimbursed by defendants for their reasonable expenses . . . and, where appropriate, members of the Consumer Advisory Board shall receive appropriate compensation." This paragraph may be contrasted with ¶¶ 7(b) & (c) of the Consent Judgment with respect to the Review Panel which explicitly provide not only for reimbursement and compensation for Panel members but also for office space, equipment and supplies, and for the hiring of staff.

In evaluating the effect of the above provisions, we recognize that a consent decree is a hybrid legal creature,

treated as a contract for purposes of interpretation and as a judicial act for the purpose of modification. Johnson Products Co. v. F.T.C., 549 F.2d 35 (7th Cir. 1977). In view of the differences between interpretation and modification of consent decrees, the nature of this proceeding must be made clear. The court is not passing on a motion by one of the parties under ¶ 9 of the Consent Judgment and Fed.R.Civ.P. 60(b) for a modification of the Consent Judgment. Instead, it is passing on a formal recommendation of the Willowbrook Review Panel and, since the Panel does not have power to recommend modifications of the Consent Judgment, the court must limit itself to construction of the Consent Judgment ^{7/} as written.

In construing a consent decree, we are guided by the "four corners" rule enunciated in United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) as follows:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot

be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected; and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation. [Footnote omitted.]

Accord, United States v. Atlantic Refining Co., 360 U. S. 19 (1959). The above principles were explicated in United States v. ITT Continental Baking Co., 420 U. S. 223, 238 (1975), where the Court stated:

Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree. Such reliance does not in any way depart from the 'four corners' rule of Armour. [Footnote omitted.]

^{8/}
As we have pointed out above, the functions of the CAB are clear, especially with respect to its in loco parentis capacity. It goes without saying that these func-

tions must be performed fully, for all the non-correspondents, and not simply for less than half of the non-correspondent class members. In passing on this application, the court has always kept in mind the plight of these members of the Willowbrook class, who are mentally retarded, usually multiply handicapped, and who by definition have no parent, friend or relative to visit them in the institution or facility to whose care they have been relegated.^{9/} While there is nothing in the Consent Judgment with respect to how these functions are to be performed, it is obvious that they must be performed by the CAB members acting alone, the CAB members with the assistance of parent groups, or the CAB members with the assistance of staff. The evidence established that neither of the first two alternatives are practicable. Resorting to the principles of contract interpretation as the above cases require, we recognize that a construction which renders the performance of a contract possible will be adopted rather than one which renders its performance impossible. Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969); 4 S. Williston on Contracts § 620, at 748 (3d ed. 1961). We believe that the reasonable expenses which the Department is required to pay to members of the CAB must be interpreted to include reasonable expenses necessary for carrying out its

functions. If the staff requested by the CAB is necessary to carry out its functions--which the court finds to be the case now--then reasonable expenses must include staff expenses. We do not believe the absence of reference to "staff" in Steps, Standards & Procedures S. 8 to be fatal to this construction, cf. Bruce v. Lumbermens Mutual Casualty Co., 222 F.2d 642 (4th Cir. 1955); its absence indicates rather that the parties did not have a fully comprehensive conception of how to deal with the problems the CAB would face.^{10/}

Even if this construction of the Consent Judgment were perceived as stepping over the bounds of construction and entering into the realm of modification, the evidence adduced at the hearing would probably justify such a modification if a motion to modify had been properly brought. This follows from the fact that this court has inherent power, in addition to the explicit reservation of jurisdiction in ¶ 9 of the Consent Judgment,^{11/} to modify the Judgment because of the necessity of continuing judicial supervision over its implementation. System Federation No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright, 364 U.S. 642 (1961); United States v. Swift & Co., 286 U.S. 106 (1932). In Swift, where defendant sought a relaxation of an antitrust consent decree, Justice Cardozo stated

that "[t]he inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. . . . Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." 286 U. S. at 119. Ten years later, the Court stated that the test of whether the district court had abused its discretion in modifying an antitrust consent decree in favor of the government was whether the change served to effectuate or to thwart the basic purposes of the consent decree. Chrysler Corp. v. United States, 316 U.S. 556 (1942). More recently, in United States v. United Shoe Machinery Corp., 391 U. S. 244 (1968), the Court held that the strict language of Swift had to be read in context and that an antitrust decree entered after litigation could be changed in favor of the government on an appropriate showing but could not be changed in favor of a defendant if the purposes of the litigation incorporated into the decree had not been fully achieved.

We recognize that the above cases concern the modification of antitrust decrees, but the same principles have been liberally interpreted and applied in other areas

of the law. For instance, in King-Seeley Thermos Co. v. Aladdin Industries, Inc., 418 F.2d 31 (2d Cir. 1969), a trademark case, the Second Circuit held there was power to modify a decree entered after litigation even in the absence of changed circumstances, although this power should be exercised sparingly in the interest of firmness and stability. In particular, the court stated that "the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes." Id. at 35. This holding was recently reaffirmed in Chance v. Bd. of Examiners, 561 F.2d 1079 (2d Cir. 1977), a civil rights case where a consent decree was negotiated after entry of a preliminary injunction, as was the case here. The court in Chance added that some sort of hearing would generally be required to make so vital a determination. If we were to modify the Consent Judgment in this case, the hearing heretofore held would satisfy this requirement.

IV

Concerning the Department's defense of the Eleventh Amendment, the court is not barred from ordering the relief

requested on the ground that to do so would impose a drain on the state treasury beyond that which the defendants consented to. At the outset, it is not clear that the power of this court to proceed with this action in the face of the Eleventh Amendment is grounded solely on consent, see N.Y.S.A.R.C., Inc. v. Rockefeller, 357 F.Supp. 752 (E.D.N.Y. 1973); Edelman v. Jordan, 415 U.S. 651 (1974); Stebbins v. Weaver, 396 F.Supp. 104 (W.D. Wis. 1975), aff'd, 527 F.2d 939 (7th Cir. 1976), cert. denied, 429 U.S. 1041 (1977), or upon consent at all. Compare Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945), with Sosna v. Iowa, 419 U. S. 393, 396 n.2 (1975), and Niagara Falls Power Co. v. White, 292 N.Y. 472 (1944). Insofar as the power of this court depends on a waiver of the Eleventh Amendment immunity by consent to the decree, the scope of the consent is not limited by the defendants' unilateral determination as to what the decree means; it is the function of the court to construe the scope of the decree to which the defendants consented. Consequently the Department's defense of immunity under the Eleventh Amendment must be rejected.

V

In conclusion, we hold that the recommendation of the Review Panel must be sustained and enforced as follows:

Within their lawful authority, including the State constitution and applicable State laws, and subject to any legislative approval that may be required, the defendants are hereby ordered and enjoined to take all action necessary to secure implementation of the Review Panel recommendation that four full-time professional staff positions and one full-time secretarial position for the CAB be approved and funded. Defendants shall take all steps necessary to ensure the full and timely financing of this recommendation, including, if necessary, submission of appropriate budget requests to the legislature.^{12/}

Dated: Brooklyn, New York
March 23, 1978.


United States District Judge

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(1)

FOOTNOTES

- 1/ The authority of the court to pass on objections to Review Panel recommendations is set out in ¶ 8(e), 8(f) & 9 of the Consent Judgment and in the Order of Feb. 7, 1977, construing ¶ 8 of the Consent Judgment.
- 2/ The cost to the Department of compliance is estimated at approximately \$130,000 per year.
- 3/ The in loco parentis functions of the CAB consist of:
 - (a) assisting the interdisciplinary team in preparing and evaluating the non-correspondent resident's development plan on at least an annual basis, and in reviewing such plans on a quarterly basis;
 - (b) appealing if necessary the content of the development plan;
 - (c) being informed on at least a quarterly basis of the non-correspondent resident's progress, including access to the resident's records (unless objected to by the resident);
 - (d) receiving notices whenever restraints are used on a non-correspondent resident;
 - (e) granting or withholding permission to use aversive conditioning or to engage in behaviorial research or modification. In this respect the CAB also has an ex-officio seat on a committee which must also pass upon requests for such treatment of any resident;
 - (f) consulting with the interdisciplinary team in its development of programming for the non-correspondent resident's normalization, which includes placement in the community; and
 - (g) appearing at conferences on behalf of non-correspondent residents with respect to transfers, requested or proposed, to other institutions or to the community.

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- 4/ The following are CAB figures representing the distribution of non-correspondent class members:

<u>Staten Island</u>	
Willowbrook	377
Nina Eaton	10
Community	36
	<u>423</u>
<u>Manhattan</u>	
Sheridan	15
Gouverneur	46
Keener	6
Community	20
	<u>87</u>
<u>Brooklyn</u>	
Spring Creek	20
Williamsburg	4
Community	21
	<u>45</u>
<u>Queens</u>	
Corona	10
Glen Oaks (2)	2
Howard Park	4
Community	22
	<u>38</u>
<u>Bronx</u>	
Castle Hill	3
Community	5
	<u>8</u>
<u>Other</u>	
Wassaic	11
Sunmount	23
Rome	3
O.D. Heck	8
Margaret Chapman	8
Broome	42
West Seneca	2
Wilton	1
	<u>98</u>

- 5/ See note 2, supra.
- 6/ See note 4, supra.
- 7/ See note 1, supra.

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- 8/ See note 2 and accompanying text, supra.
- 9/ This court is determined that at the end of the Willowbrook class' long journey through state institutions the class members shall attain the normalization which is promised to them in the Consent Judgment.
- 10/ According to counsel for the plaintiffs, the parties had no idea of the number of non-correspondent class members at the time the Consent Judgment was signed.
- 11/ Paragraph 9 of the Consent Judgment provides in part:
- Jurisdiction is retained by the Court until further order, for the purpose of enabling any party to apply at any time for an order pursuant to Rule 60 of the Federal Rules of Civil Procedure, or for such further orders as may be necessary or appropriate for the construction of, implementation of, or enforcement of compliance with this judgment or any of the provisions thereof.
- 12/ The Department pointed out at the hearing that the CAB budget was presently a part of the Willowbrook Developmental Center budget, and stated that to grant additional staff to the CAB would be to rob Peter to pay Paul. We therefore stress the fact that any reduction in the level of services provided the class members in complying with this order will be wholly unacceptable to the court. See ¶ W.4 of the Steps, Standards & Procedures.